Law As a Species of Language Acquisition

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LAW AS A SPECIES OF LANGUAGE ACQUISITION

JIM CHEN

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I. THE WORD AND THE LAW

In the beginning was the word, and the word was with the law, and the
word was law.¹ This symposium on law and linguistics marks the
triumphant conclusion to a beginning, the completion of the “intentionally
narrow undertaking”² launched by Lawrence M. Solan³ and his cohorts in

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² Clark D. Cunningham et al., Plain Meaning and Hard Cases, 103 Yale L.J. 1561 (1994).
³ See LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES (1993); Lawrence M. Solan, When
the Law and Linguistics Consortium. By "using linguistics to critique judicial decisions [that] treat[] ambiguous texts as if they were plain," these pioneers have begun to explore different ways in which "analysis of ambiguous texts by linguists could actually assist judges in identifying and choosing among possible [legal] interpretations." True to the tradition of Clark Cunningham, the law and linguistics movement has dedicated itself to resolving specific, concrete legal problems. In the classic fashion of practical lawyering, it has "identified" an issue" in one or another statutory dispute, "assemble[d] the available information, [and] evaluate[d] potential responses" based on the state of the linguistic art. Linguistic analysis of law has focused on discrete "cases and controversies," and the federal courts have returned the favor by citing Solan's The Language of Judges and Plain Meaning and Hard Cases, the Yale Law Journal review of Solan's work. As tribute to the movement's phenomenal success, two of America's foremost experts on statutory interpretation have advised the Office of the Solicitor General to "hire some good linguists."

We who have learned to sail amid the sea of indeterminate legal language should thank linguistic analysis of law for spotting "a few more stars by which to steer." Perhaps the time has come for us to

4. See Brief Amicus Curiae of the Law and Linguistics Consortium in Support of Respondents at 1, United States v. X-Citement Video, Inc., 115 S. Ct. 464 (1994) (No. 93-723) (identifying the members of the Consortium as Clark D. Cunningham, Georgia M. Green, Jeffrey P. Kaplan, Judith N. Levi, and Lawrence B. Solan—the authors of the works cited supra notes 2 and 3).

5. Cunningham et al., supra note 2, at 1561.


13. Cunningham et al., supra note 2, at 1617.
envision even grander ambitions. Let us build a tower that will reach beyond the stars; let us chance whatever consequences may befall us. What else can the law learn from linguistics? Or, perhaps more intriguingly, what can linguistics tell us about the way we learn law? "In the inductive, constantly evolving world of law," in an intellectual maelstrom whose complexities approach those of economic and terrestrial ecosystems, we know not what we might discover if we think of law, linguistics, and the connection between law and linguistics as "a continuous process of learning and experimentation."

Law and linguistics scholarship has focused on matters of semantics, syntax, and pragmatics—the essentials of meaning, sentence structure, and noncontextual aspects of language. Like any other science, linguistics begins from basic building blocks and works its way through the synchronic, diachronic, and comparative study of language. This progression from specific linguistic components to more general classes gives linguistics an undeniably inductive quality. The next wave of law and linguistics scholarship may find that its essential project lies in finding the most fruitful level of scientific specificity. If too refined, too "pure," and not sufficiently "applied," linguistics has little to offer the law. Without fanfare, Plain Meaning and Hard Cases relegated its discussion of phonetics, phonology, and morphology to a single footnote.

14. Compare Gen. 11:1-9 (describing how God foiled the Tower of Babel by "confounding" the speech of its builders and rendering them unable to "understand one another's speech") with Acts 2:1-14 (describing how the the words of the disciples at Pentecost were understood by each of the represented nationalities in its own language). See generally Berman, supra note 1, at 165 ("Implicit in the story of the Tower of Babel is the story of Pentecost, [which] gives hope that . . . by translation from one language to another all peoples of the world may, by the power of a higher spiritual truth, share each other's experiences vicariously and become . . . united.").


17. Farber, supra note 7, at 791.

18. See Cunningham et al., supra note 2, at 1568.

19. Compare Ferdinand De Saussure, Cours de Linguistique Générale 63-95 (2d ed. 1948) (expounding basic principles of phonology) with id. at 141-289 (surveying synchronic, diachronic, and geographic variations in language).

20. See Louis Hjelmslev, Prologomena to a Theory of Language 11-12 (Francis J. Whitfield trans. 1961) (translating Louis Hjelmslev, Omkring Sprøgteriens Grundlæggelse 12 (1943)).

strain to imagine how the mechanics of sound production or the sound system of the English language might affect the law. Linguistics at too high a level of abstraction likewise seems unhelpful. American law rarely considers the nuances of foreign languages, and *a fortiori* the entire field of comparative linguistics, especially as applied in the ongoing search for linguistic universals, seemingly lies outside the useful domain of law and linguistics.

This assumption is demonstrably wrong. To the extent that we legal writers might believe otherwise, we have only ourselves to blame. We have been misunderstanding the relation between law and linguistics all along.

II. THE REMEMBRANCE OF THINGS PAST:

OF THE DREAMER AND THE SCHEMER

Thanks to the Law and Linguistics Consortium, we are witnessing the emergence of a scholarship that subjects law to explicitly linguistic analysis. But the law has already been trying to reconcile itself with linguistic teachings for some time. Legal thinkers have constantly sought the elusive balance between the priest and the practitioner, between the dreamer and the schemer. It should come as no surprise that Clark Cunningham began his teaching career as a clinical instructor and continues to dramatize real legal stories in his scholarship. What is surprising is the gap between the linguistic analysis that the legal academy hypothetically prefers and the linguistic analysis that the judiciary actually performs. Especially in the fields of statutory interpretation and constitutional law,

...
legal scholars have plunged headlong into the linguistic subdiscipline of pragmatics.26 Much of this scholarship is overtly embarrassed by the law's tepid intellectual reputation; its authors seem subconsciously motivated by Ph.D. envy. Many a post-collegiate path to a legal professorship covers less than half the time between the Graduate Record Exam and the dissertation defense. Only in law do the professors teach the classes and the students edit the journals;27 the opposite is true throughout the rest of the academy.28 At the other extreme, the "new textualism" of the Rehnquist Court has cloaked itself in a shroud of quasi-scientific linguistic analysis, seeking semantic shelter among lexicographic islands in a sea of uncertainty.29 Armed with ad hoc linguistic reasoning and its choice of dictionaries,30 the new textualism suggests that exclusive reliance on "the ordinary meaning of [statutory] language in its textual context" and the "established canons of construction" will shield judges from the pernicious influences of pragmatism and contextually contingent interpretation.31


28. Cf., e.g., JANE SMILEY, MOO 245 (1995) ("As usual, his exams would be given out by his graduate assistants and graded by the university computer. Those grades would then be . . . tallied according to a statistical curve, and reported to the students. By then, Dr. Lionel Gift would have been in Costa Rica for over a week. Let it snow let it snow let is snow: He would not be here to see it, and that suited him perfectly.").


With so wide a gap, no wonder legal scholarship can neither satisfy the needs of practicing lawyers nor generate novel ideas for their own sake. Granted, it is no small task to reconcile the contradictory tendencies of the hermeneutical hermit and the tome-thumping textualist. Solon of Athens gave wise laws; Solan of America has given wise advice. Neither a minstrel nor a scrivener be. Though also stricken by Ph.D. envy, I write in hopes of finding an alternative to the two dreary extremes presented by prevalent legal treatments of linguistic concepts. The inherent unreliability of dictionaries and the Supreme Court’s shameless dictionary-shopping undermine the new textualism’s claim to coherence. On the other hand, the academic response to the new textualism has often assumed the posture of the deconstructionist, arrogant in her belief that she can dismantle any text. But if “[t]he Justices have not been reading their Derrida,” why should we? Why must we speak as though a quest for meaning will surely fail, as though the application of linguistics to law will necessarily obliterate any hope of finding an interpretive anchor? “Ay, there’s the rub.”

Deconstructionist hermeneutics notwithstanding, modern linguistics offers scant support to critical theories so corrosive that they consume themselves. What would happen if we described the legal

34. Cf. WILLIAM SHAKESPEARE, HAMLET act 1, sc. 3, l. 75 (Riverside ed., 1974) (“Neither a borrower nor a lender be”) [hereinafter HAMLET]; cf. also Cunningham et al., supra note 2, at 1565 (declining to “address the[] difficult jurisprudential issues” raised by “the scholarly attention devoted to new textualism”).
35. See id. at 1614-16; Solan, When Judges Use the Dictionary, supra note 3.
36. See Note, supra note 30.
39. Cf. Law and Linguistics Conference, 73 WASH. U. L.Q. 785, 882 (1995) (statement of William N. Eskridge, Jr.) (acknowledging that none of the participants in the Law and Linguistics Conference writes in the deconstructive style of critical theory); id. at 884 (statement of Michael Moore) (“I actually think the discipline of law, fortunately, is not so permeated with followers of Habermas, Derrida, Gadamer et al[,] and I actually think it’s a passing phase . . . .”).
40. HAMLET, supra note 34, act 3, sc. 1, l. 64.
process and the legal academy in more honest linguistic terms? We might
discover that law without linguistics is but a naked abstraction, like the
painting of a sorrow, a face without a heart.42

III. LOST IN TRANSLATION

A. Innocents Abroad

James Boyd White43 and Clark Cunningham44 have offered a felicitous
metaphor that helps us begin to clarify the proper relationship between law
and linguistics. They describe law as translation, as the rendering of
ordinary, nonlegal language into the patois of the legal system. For
Cunningham, effective legal representation presents the ultimate challenge
to the lawyer as translator: “The translator does not silence the speaker but
rather seeks to enhance the speaker’s voice by adding her own... and may
even collaborate with the speaker to produce a statement in the foreign
language that is more meaningful than the speaker’s original utterance.”45

The good lawyer speaks both the language of the law and the language of
the people.

Translation in the sense of traversing linguistic barriers fits the
representational setting well enough. As fewer legally trained professionals
represent actual clients, however, the translation metaphor may prove too
narrow to capture the fuller senses in which we “learn” or “do” law.
Lawrence Lessig’s sense of “translation” extends the metaphor to the
interpretive setting,46 albeit at the price of implicitly taking sides in the
debate over whether judges are properly seen as agents of the legislature.47
Furthermore, although White, Cunningham, and Lessig properly envision
translation as a rich, complete experience, the term “translation” carries
with it the baggage of generations of bad foreign language instruction. As

42. HAMLET, supra note 34, act 4, sc. 7, ll. 108-09.
worlds, much as a translator exposes one culture’s literature to another).
44. See Cunningham, The Lawyer as Translator, supra note 6; Cunningham, A Tale of Two
Clients, supra note 6, at 2482-85.
45. Cunningham, The Lawyer as Translator, supra note 6, at 1300.
47. See generally Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 HARV. L.
any student of foreign language has discovered, transplanting native semantics or syntax into a foreign setting will almost surely cause trouble.\textsuperscript{48} Indeed, “translation” in the rigid sense of textual manipulation comes perilously close to the constitutional catechism that animates the new textualism and its formalist cousins.\textsuperscript{49} At its most extreme, formalist dogma posits that identifying all of the “established” canons of interpretation and subjecting them to brute Euclidean logic will yield one and only one answer to every legal problem.\textsuperscript{50} Learning or “doing” law in this fashion is as likely to succeed as painstaking analysis of the Gallic Commentaries, the Iliad, or 

\textit{Hrafnkels saga freysgøða} is likely to prepare the “translator” for daily life in modern Italy, Greece, or Iceland.\textsuperscript{51} The living law does not and should not resemble the paleolinguistic exercise of excavating ancient texts so that today’s scholars can project modern readings onto them.\textsuperscript{52}

\textsuperscript{48} Inquire, for instance, about \textit{préservatifs} in a French pastry shop, and you will probably communicate an interest in something besides French baking secrets. The “translation” problem exists even between the United States and the United Kingdom, two nations separated by a common language. Thus, a Briton who asks her American host to “knock me up” at a chosen hour in the morning might be getting more than she bargained for.

\textsuperscript{49} See George Kannar, \textit{The Constitutional Catechism of Antonin Scalia}, 99 \textit{Yale L.J.} 1297, 1320 (1990) (describing this formula, “In the beginning was the Word, and the Word was with the Law, and the Word was Law”—which is a blasphemous transformation of John 1:1—as “the short and simple recipe for a catechetical Constitution”).


\textsuperscript{52} Cf., e.g., \textit{Richard A. Posner, The Federal Courts: Crisis and Reform} 286-93 (1985) (urging judges interpreting statutes to engage in “imaginative reconstruction” of the enacting legislature’s intent); Roscoe Pound, \textit{Spurious Interpretation, 7 Colum. L. Rev.} 379, 381 (1907).
In the end, "translation" is an incomplete metaphor for the law as a system of language, for it presupposes not only the existence of multiple languages in law, but also the process by which lawyers attain their talent as polyglots. Neither premise is necessarily wrong—in fact, I shall defend them both in due time—but one cannot assess the artistry of an American translation of Molière’s *Le Misanthrope* without an underlying understanding of both French and English. Moreover, the bad image of translation compounds the law’s archaeological perception of language, the law’s stupefying obsession with *la langue littéraire* at the expense of *la parole* as the dynamic engine of linguistic evolution.\(^{53}\)

Most errors by lawyers as amateur linguists can be traced to the assumption that language is a static mechanism rather than a living organism. The law looks to plain language techniques as though linguistic analysis were prescriptive rather than descriptive. In criticizing *Webster’s Third New International Dictionary* for “its portrayal of common error as proper usage,”\(^{54}\) Justice Antonin Scalia expressed the classic lawyerly misperception of linguistics. To a linguist, “common error” is “proper usage.” By contrast, verbal etiquette is the domain of lawyers, literary critics, and various other self-appointed guardians of manners and customs. The instinctive legal reaction to linguists and linguistics—“What have you guys got against dictionaries?”—shows how far the legal world is from understanding how linguists “can give us more reliable information about the meanings of words.”\(^{55}\) Dictionaries offer at best an imperfect measure of an “individual état de langue,” of language “as a closed totality” to be analyzed solely for the “functions between its parts.”\(^{56}\) And a minute portion of the état de langue at that: dictionaries rarely, if ever, provide useful information on syntax. The shortcoming is often critical; even when everyone agrees over the definition of *knowingly*, there may be sharp disagreement over whether the word modifies specific statutory terms.\(^{57}\)

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\(^{53}\) Compare SAUSSURE, supra note 19, at 45-47 (discussing the illusory prestige of written language over spoken language) with *id.*, at 36-39 (discussing the way in which daily speech modifies linguistic conventions over time).

\(^{54}\) MCI Telecommunications Corp. v. American Tel. & Tel. Co., 114 S. Ct. 2223, 2230 n.3 (1994).

\(^{55}\) *Law and Linguistics Conference*, supra note 39, at 823 (statement of Charles Fillmore).

\(^{56}\) LOUIS HJELMSLEV, LANGUAGE: AN INTRODUCTION 8 (Francis J. Whitfield trans., 1970).

\(^{57}\) See generally SOLAN, supra note 3, at 95-98 (distinguishing between “structural ambiguity” and “problems of categorization” as major causes of statutory ambiguity); Cunningham et al., *supra* note 2, at 1573-77 (discussing United States v. Staples, 972 F.2d 608 (10th Cir. 1992), rev’d, 114 S. Ct.
Let us modify rather than abandon the translation metaphor.\textsuperscript{58} Perhaps it is more fruitful to ask how one masters any language, much less the language of the law. For the professional linguist, "the chief problem . . . will always be, not the individual \textit{état de langue}, but the relationship between different stages of a single language and between different languages, their similarities and their differences."\textsuperscript{59} Given enough information, the comparative linguist might begin to identify "typological relationships" between languages, relationships "based on an agreement in structural features that is conditioned by the general possibilities of language."\textsuperscript{60} Stated at this most general level, the search for linguistic universals—nothing less than a quest for the universal grammar that makes language possible\textsuperscript{61}—parallels what Lon Fuller described as the ultimate goal of jurisprudence, the search for "the morality that makes law possible."\textsuperscript{62}

B. The Origin of Speech

The judicial obsession with lexicographic snapshots of language grows out of an uninformed or at best obsolete view of linguistics. So does the overwhelming academic preference for language philosophy over a more scientific approach to linguistics. As we stand on the brink of a century whose principal intellectual project may consist of overthrowing the Standard Social Science Model,\textsuperscript{63} we should acknowledge the brooding omnipresence of B.F. Skinner. For Skinner, language was just another expression of behavioralist psychology: environmental stimuli in,

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1793 (1994)). \textit{See also}, e.g., United States v. X-Citement Video, Inc., 115 S. Ct. 464 (1994) (analyzing the range of the statutory adverb \textit{knowingly}); \textit{cf.} Ratzlaf v. United States, 114 S. Ct. 655 (1994) (analyzing the range of the statutory adverb \textit{willfully}).

\textsuperscript{58} \textit{Cf.} \textit{MCI Telecommunications}, 114 S. Ct. at 2229 (holding that \textit{modify} means "to change moderately or in minor fashion").

\textsuperscript{59} \textit{Hjelmslev, supra} note 56, at 9.

\textsuperscript{60} \textit{Id}.


conditioned responses out. At its most extreme, Skinner's theory claimed that experimental work on nonhuman psychology could "be extended to human [verbal] behavior without serious modification." Two of the preeminent language philosophers of Skinner's time, W.V.O. Quine and Ludwig Wittgenstein, depicted language acquisition in terms that were essentially indistinguishable from Skinner's theory. Quine explicitly adopted Skinner's behavioralist model, arguing that some societal reward, even as modest as "corroborative usage" of language bearing some "resemblance to the child's effort," provided the needed stimulus and reinforcement to help a child attain language competency. Wittgenstein credited explicit drill-and-repetition linguistic instruction, even though this training technique has created no fluency in Latin in the modern era.

The American legal academy might justify its predilection for language philosophers such as Quine and Wittgenstein as a part of a grander effort to understand pragmatic constraints on legal language. As shown by William Eskridge's explanation of Francis Lieber's "fetch some soupmeat" hypothetical, hermeneutics has enhanced the law's understanding of the myriad ways in which context might affect the legal interpretation. Generational differences in intellectual tastes offer a less charitable but nevertheless inoffensive explanation for the contemporary focus on Quine and Wittgenstein. Between 1956 and 1966, there was at least one future Supreme Court Justice among Harvard Law School students. Those students—Ruth Bader Ginsburg (class of 1959, transferred to Columbia before the 1958-59 school year), Antonin Scalia ('60), Anthony Kennedy ('61), Stephen Breyer ('64), and David Souter

64. See B.F. SKINNER, VERBAL BEHAVIOR (1957).
65. Id. at 5.
66. WILLARD VAN ORMAN QUINE, WORD AND OBJECT 82-83 (1960).
('66)—constitute a majority on today’s Court. These future Justices attended Harvard during the golden age of the “legal process” school; all five took Henry Hart and Albert Sacks’s legal process class. These Justices’ law school contemporaries enjoy a commanding grip on today’s judiciary and legal academy. It is altogether understandable that today’s legal leaders might favor the language philosophers who dominated the intellectual scene during their formative educational years.

This period, however, happened to be a tumultuous one for linguistics. Two generations earlier, in 1921, Edward Sapir’s Language had inspired young Louis Hjelmslev to envision “the possibility of establishing a comparative general linguistics destined to supersede the subjective and sentimental philosophy of language of the past.” In the crucial decade between 1956 and 1966, Noam Chomsky fulfilled Hjelmslev’s prophecy. As Consortium member Judith Levi has acknowledged, Chomsky “transformed linguistics as a discipline” by “turn[ing] linguistics into a theory[[-]building enterprise [with] rigorous expectations.” In 1957, the same year in which Skinner’s Verbal Behavior appeared, Chomsky published Syntactic Structures, his earliest effort at sketching the outline of a generative grammar. This event marked a scientific “turning point” in linguistics. When Chomsky published his devastating 1959 review of Skinner’s book, contemporary linguistics witnessed a cosmic collision,

70. See Nancy Waring, Stephen Breyer: A Look Back at Law School, 46 HARV. L. BULL. 4, 8 (1995) (a list of Supreme Court Justices who studied at Harvard Law School). This period’s influence thus rivals and may eventually eclipse the influence exerted by the Harvard Law School of the 1930s, when Harry Blackmun (class of ’32), William Brennan (’31), and Lewis Powell (LL.M. ’32) studied there, Felix Frankfurter taught there, and Erwin Griswold lobbied forcefully against President Roosevelt’s Court-packing plan.


72. See EDWARD SAPIR, LANGUAGE: AN INTRODUCTION TO THE STUDY OF SPEECH (1921).

73. Louis Hjelmslev, Edward Sapir, I ACTA LINGUISTICA 76, 77 (1939).

74. Law and Linguistics Conference, supra note 39, at 899. This intellectual revolution apparently took hold among linguists during the 1960s and 1970s, see id., and thus may have postdated the height of the legal process era in legal education. By now, the nonlegal intellectual consensus is clear: the Arts and Humanities Citation Index ranks Chomsky as the most cited living person and the eighth of all time. See Carlos P. Otero, Foreword, in 1 NOAM CHOMSKY: CRITICAL ASSESSMENTS xx1, xx11 (Carlos P. Otero ed. 1994); Kim Vandiver, MIT Tech Talk (April 15, 1992) (university newsletter).

75. See NOAM CHOMSKY, SYNTACTIC STRUCTURES (1957).


perhaps one of paradigmatic dimensions.\textsuperscript{78} Skinner had portrayed language as a two-pronged, stimulus-response machine; if linguists could identify all of the admittedly large number of relevant social stimuli, they could explain and predict speech as a conditioned response. Far from satisfying what Chomsky would later clarify as “explanatory adequacy” in linguistic theory,\textsuperscript{79} Skinner’s model represented for Chomsky “a kind of measure of the importance of the factors omitted from consideration,” “an indication of how little is really known about [the] remarkably complex phenomenon” of language.\textsuperscript{80} The fault lay, according to Chomsky, in Skinner’s apparent belief “that the contribution of the speaker is quite trivial and elementary.”\textsuperscript{81}

Whereas Skinner had emphasized the predictability of language as a psychological phenomenon, Chomsky’s opposing view stressed linguistic creativity, “the capacity that all native speakers of a language have to produce and understand an indefinitely large number of sentences that they have never heard before and that may indeed never have been uttered before.”\textsuperscript{82} The distinction is crucial. How speakers respond to social conditioning explains precious little; what speakers actually do despite the absence of rigorous training comprises the mystery and the magic of language at their fullest. The authors of \textit{Plain Meaning and Hard Cases} restated this proposition quite ably: “The very flexibility of language . . . is possible precisely because the range of meaning of a word or sentence cannot be limited in advance by prescription but rather is realized in the creativity of actual use.”\textsuperscript{83}

From the Chomskyan perspective, the child’s “remarkable capacity for learning typifies this creative aspect of language.”\textsuperscript{84} “[W]ithout any explicit instruction,” the young child gains “perfect mastery of a language with incomparably greater ease” than even the most rigorously trained


\textsuperscript{80} Chomsky, \textit{supra} note 77, at 28.

\textsuperscript{81} Id. (emphasis added).

\textsuperscript{82} JOHN LYONS, NOAM CHOMSKY 21 (1970).

\textsuperscript{83} Cunningham et al., \textit{supra} note 2, at 1616.

\textsuperscript{84} Chomsky, \textit{Book Review, supra} note 77, at 43.
adults.\textsuperscript{85} "Mere exposure to . . . language[] for a remarkably short period"\textsuperscript{86} permits the child to acquire the entire "system of linguistic competence that underlies behavior."\textsuperscript{87} Universal grammar, or UG, is intrinsic to the speaker. By contrast, the much-vaunted environmental influences of Skinner's behavioralism merely channel the child's linguistic instincts toward a single, underlying set of phonological, semantic, and syntactic rules.\textsuperscript{88} The nature of UG points to a biological and uniquely human wellspring for the gift of language: the likely absence of any "structure similar to UG in nonhuman organisms" means that "the capacity for free, appropriate, and creative use of language as an expression of thought" is almost surely "a distinctive feature of the human species."\textsuperscript{89}

Even a cursory survey reveals some of the broader implications of the Chomskyan revolution\textsuperscript{90} for linguistic analysis of law. As an initial matter, an acknowledgement of Chomsky's contributions should cool off the legal academy's torrid love affair with Quine and Wittgenstein. These language philosophers have provided useful word games,\textsuperscript{91} but their views on the origins of language are suspect. Wittgenstein's "examples and remarks, often brilliant and perceptive, lead right to the border of the deepest problems, at which point he stops short and insists that the philosopher can

\textsuperscript{85} Noam Chomsky, \textit{Explanatory Models in Linguistics}, in \textit{Logic, Methodology and Philosophy of Science} 528, 529 (Ernst Nagel et al. eds., 1962).

\textsuperscript{86} Id.

\textsuperscript{87} Noam Chomsky, \textit{Language and Mind} 4 (enlarged ed. 1972).


\textsuperscript{89} Noam Chomsky, \textit{Reflections onLanguage} 40 (1975); see also Noam Chomsky, \textit{Cartesian Linguistics: A Chapter in the History of Rationalist Thought} 4-5 (1966) ("[M]an has a species-specific capacity, a unique type of intellectual organization which cannot be attributed to peripheral organs or related to general intelligence and which manifests itself in what we may refer to as the 'creative aspect' of ordinary language use . . . .").


\textsuperscript{91} See Solan, \textit{The Language of Judges}, supra note 3, at 96 (identifying Wittgenstein's problem of a "game" that should be taught to children, see Wittgenstein, supra note 67, §§ 66-75, at 31-35, and Quine's discussion of the appropriate definition of a "mountain," see Quine, supra note 66, at 126).
go no further." For his part, Quine rejected transformational grammar and other efforts to find a universal grammar as "folly," bound to be "stifle[d]" by "[x]timely reflection on method and evidence." Adhering to his view that the "indeterminacy of translation" imposes insurmountable pragmatic constraints on language, Quine insisted as late as 1974 that "the child learns most of language by hearing the adults and emulating them," even as his scientific contemporaries continued to document the extraordinary extent of the human child's linguistic instincts.

Quine's empiricism appeals to legal scholars' overwhelming preference for the Standard Social Science Model, for the view that human beings are strictly the products of social conditioning. But ever since nineteenth-century pioneers such as Rasmus Rask and Franz Bopp began identifying genetic relationships among Indo-European languages, it has been possible to think of language in biological terms and to study language acquisition and linguistic change as biological processes. Today's linguists are unearthing even more dramatic linkages between reproductive


94. See W.V. Quine, THE ROOTS OF REFERENCE 82-84 (1974); QUINE, supra note 66, at 27, 54, 72-79, 206, 221.


96. See, e.g., Roman Jakobson, Studies on Child Language and Aphasia 7-29 (1971); cf. Carol Chomsky, The Acquisition of Syntax in Children from 5 to 10, at 121 (1969) (concluding that "active syntactic acquisition" takes place in children up to the age of 9). Roman Jakobson had been arguing for three decades that cross-linguistically common sounds, such as front voiceless stops and nasals were the first sounds acquired by infants and the last sounds lost by aphasics. See Roman Jakobson, Child Language, Aphasia, and Phonological Universals 13-45 (1941); Roman Jakobson, Two Aspects of Language and Two Types of Aphasic Disturbances, in FUNDAMENTALS OF LANGUAGE 53 (Roman Jakobson & Morris Halle ed., 1956). See generally Antoine Grégoire, L'APPRENTISSAGE DU LANGUAGE (1937).

97. See, e.g., Quine, THE ROOTS OF REFERENCE, supra note 94, at 84:

The child learns [native syntax] by somehow getting a tentative and faulty command of a couple of its component devices, through imitation or analogy perhaps, and then correcting one against the other, and both against the continuing barrage of adult precept and example, and going on in this way until he has a working system meeting social standards.

98. See Rasmus Rask, VEILEDNING TIL DET ISLANDSKE ELLER GAMLE NORDISKE SPROG (1818) ("Investigation into the Origin of the Icelandic or Old Norse Language"); FRANZ BOPP, ON THE CONJUGATION SYSTEM OF THE SANSKRIT LANGUAGE, IN COMPARISON WITH THOSE OF THE GREEK, LATIN, PERSIAN AND GERMANIC LANGUAGES (1816).
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Let there be no doubt. After Chomsky, linguistic science portrays human language as "a true species property," an element of the "biological endowment" unique to Homo sapiens. Steven Pinker has flatly articulated the Darwinian implications that Chomsky himself denies: the power of speech is "an evolutionary adaptation," and "human language is a part of human biology." Arguably, "the ability to use a natural language belongs more to the study of human biology than human culture; it is a topic like echolocation in bats or stereopsis in monkeys, not like writing or the wheel." For an intellectual community that prefers a sharp division between nature and culture and unflinchingly assigns law to the latter realm, linguistics casts a long, profoundly disturbing Darwinian shadow across the law. The Fourteenth Amendment may not have enacted Herbert Spencer's Social Statics, but the structure of the language by which we make and debate law is "sharply limited" by the

99. See, e.g., Luigi L. Cavalli-Szorfa, Genes, Peoples and Languages, 265 SCIENCE 104 (1991); Luigi L. Cavalli-Szorfa et al., Reconstruction of Human Evolution: Bringing Together Genetic, Archaeological, and Linguistic Data, 85 Proc. Nat'l Acad. Sci. 6002 (1988). So it turns out that people who talk together sleep together. How shocking. In a Darwinian world, there are two and only two forces that matter. One of them is food. The other is sex. Language is how most of us get both.

100. CHOMSKY, REFLECTIONS ON LANGUAGE, supra note 89, at 10. For Chomsky's full response to Quine's "indeterminacy of translation" hypothesis, see id. at 179-204.

101. See NOAM CHOMSKY, LECTURES ON GOVERNMENT AND BINDING: THE PISA LECTURES 3 (5th ed. 1988) [hereinafter CHOMSKY, LECTURES ON GOVERNMENT AND BINDING] ("[I]t is a near certainty that fundamental properties of . . . attained grammars are radically underdetermined by evidence available to the language learner and must therefore be attributed to UG itself.").

102. NOAM CHOMSKY, KNOWLEDGE OF LANGUAGE: ITS NATURE, ORIGIN, AND USE xxvi (1986) [hereinafter CHOMSKY, KNOWLEDGE OF LANGUAGE].


105. Steven Pinker & Paul Bloom, Natural Language and Natural Selection, in THE ADAPTED MIND, supra note 63, at 451.

106. See generally, e.g., ALAIN, L'HOMME ET L'ANIMAL (1962) (distinguishing sharply between bestial "nature" and human "culture").

IV. LAW, LANGUAGE, AND LEARNING

So it appears that our linguistic ship atop the sea of legal indeterminacy is the Beagle. But where will it take us? If not to new lands, then toward new ways of seeing familiar terrain. The existence of universal grammar reinforces the discovery of universals in other language-based disciplines. For instance, Joseph Campbell's classic study, The Hero with a Thousand Faces, showed how heroic myths from diverse cultural and religious traditions nevertheless converged. So it may be with law. If there is a "universal grammar" that binds the law, however, we are unlikely to find it through the crude methodology of the new textualism. Law is a language, but not a natural one. Law has its audiences, but not necessarily the same ones as the "speech communities" known to linguists. There may be a universal legal grammar; if so, it probably incorporates nonlinguistic constraints on judicial decisionmaking. Such are the peculiarities of law as a species of language acquisition.

A. The Unholy Trinity of the Interpretive World

The unthinking observer may assume that a search for legal universals will redound to the benefit of the new textualism. True, there is a sense in which "the empirical investigation of testable hypotheses" by linguists may lend greater credibility to the textualist search "for some 'objective' word meaning that cannot be circumvented by willful judges." But there is something primitive, something pre-Chomskyan about the architecture of an unsophisticated "plain meaning" approach to statutory interpretation. To the extent that plain meaning approaches are attempting to follow the intellectual path blazed by the pioneers of linguistic universals, the new textualists sound a wee bit aphasic.

In the spirit of an eclectic but integrative jurisprudence that binds together all approaches toward understanding language, I shall enlist

108. CHOMSKY, REFLECTIONS ON LANGUAGE, supra note 89, at 10.
the help of the late Walker Percy. In addition to being a novelist and a Christian existentialist, Percy cultivated a lifelong interest in linguistics. In 1975, he published *The Message in the Bottle*, a collection of essays on linguistics. Published before Chomsky delivered his landmark lectures on government and binding, Percy's essays provide the insights of an informed but nonexpert observer of linguistics in the crucial period between 1954 and 1975. Although "descriptively inadequate" as a theory of language acquisition, Percy's philosophy had the inadvertent virtue of being "empirically indistinguishable from Chomsky's." Finally, his status as an outsider emulates that of the lawyer interested in linguistics or, indeed, that of the linguist interested in explaining her craft to a nonlinguist. Just as Consortium member Georgia Green explains pragmatics from the perspective of an Australian aborigine who is trying to learn English,
Percy adopted the point of view of a “Martian making his first visit to earth,” amazed by the phenomenon of human speech.  

For our purposes, Percy’s greatest contribution lies in his description of speech as symbol manipulation. Like Susanne Langer before him, Percy stressed “the universal symbolific function of the human mind.”

Inspired by the story of Helen Keller’s remarkable breakthrough into linguistic awareness, when the deaf and blind girl linked “the wonderful cool something that was flowing over [one] hand” with the letters “w-a-t-e-r” being formed in her other hand, Percy asserted that “an inkling of what happened in [that] well-house in Alabama” would teach us “more about the phenomenon of language . . . than is contained in all the works of behaviorists, linguists, and German philosophers.”

Linking both the object “water” and the symbol water with Helen, he portrayed the event as an example of the “Delta phenomenon”:

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Helen ↔ Water (word) ↔ Water (liquid)
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Helen Keller and the Delta Phenomenon

Symbol, object, and interpreter: behold, the unholy trinity of the interpre-


118. Walker Percy, Symbol as Need, in The Message in the Bottle, supra note 113, at 289, 292 (reviewing Susanne K. Langer, Feeling and Form (1953) and Susanne K. Langer, Philosophy in a New Key (3d ed. 1957)).


This triangular, or "triadic," visualization of the language function pervades Percy's essays on linguistics. Percy's triad links the two Saussurian components of the linguistic sign—the conceptual signifié and the acoustic significant—with the interpreter at the center of Chomskyan linguistics. The triadic vision stands in stark contrast with the bipolar stimulus-response model at the heart of Skinner's Verbal Behavior. By emphasizing the interpreter as the flexible human link between symbolizing word and symbolized object, Percy's model of language reverses Skinner's effort to minimize the role of the speaker. The triadic construct concedes the irreducible role of human intuition in any putatively objective test of grammar. The Chomskyan influence is obvious and inextricable.

It is a shame that B.F. Skinner did not become a lawyer; he would have found himself surrounded by like thinkers who believed in their ability to reduce the world to a series of stimuli and responses. Whether the social sciences would have benefited from his absence is less clear than the legal philosophy he would have adopted. The jurisprudence, so to speak, of behavioralist linguistics would have been positivism unmodified. As between Skinner's bipolar stimulus-response and Percy's pivoting triad, the Skinnerian model is the one that befits The Rule of Law as a Law of Rules. The new textualism presupposes a strict one-to-one relationship between symbol and object, between a statutory term and its "plain

121. Cf. Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) ("It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.").

122. See generally WALKER PERCY, Toward a Triadic Theory of Meaning, in THE MESSAGE IN THE BOTTLE, supra note 113, at 159. What Percy called his "theory of language" is nothing more than a few elaborations on this basic model. See PERCY, A Theory of Language, supra note 117, at 325, 327.

123. See SAUSSURE, supra note 19, at 99-100.

124. See PERCY, Toward a Triadic Theory of Meaning, supra note 122, at 162.

125. Consider the following statement by Law and Linguistics Conference participant Michael Gels: Chomsky gave an argument in support of [intuition] way back when that has never been discredited. Suppose that we decide to create an objective test of grammaticality and create something like a lie detector machine that one straps a native speaker in. If you read the speaker [an ungrammatical sentence,] she'll perspire and the needle will go haywire . . . because the objective test has proved it's not grammatical. . . . [T]he calibration of our machine is going to be based on the intuitions of the native speaker. It's unavoidable. You must refer to the native speaker's intuition . . . to calibrate your [otherwise objective] machine.

Law and Linguistics Conference, supra note 39, at 918.


meaning.” Textualism makes a herculean effort to preclude judicial consideration of extrinsic indicia of meaning because it fears that these interpretive practices may misdirect the crucial project of linking words with their meanings. By contrast, the antiformalist schools of legal realism and critical legal studies “maintain that the principal feature of judicial behavior is something internal to the judge,” that “external instructions” and influences “make very little difference in what judges do.”

Extended to its logical end, linguistic introspection points to the interpreter—and not the text—as the source of legal meaning. At its worst, the new textualism has so willfully denied the role of the judicial interpreter that it fails to see the seething normative debate lurking in the directive to use “established canons of [statutory] construction.” This sort of new textualist is the Dorian Gray of American law, an unregenerate sinner who projects his political transgressions onto a painting of the sullied judiciary while retaining the bloom of youth and innocence in his cheeks. In the Wilde world of statutory interpretation, the biggest Skinnerhead among contemporary analysts of legal language is Antonin Scalia.

B. When I Spake as a Child: The Logical Problem of Legal Education

The new textualism’s claim that it relies on a rigorously deductive methodology points to a second, even more devastating defect. Like every other “foundational” theory of statutory interpretation, the new textualism is a “top down” model of legal reasoning, proceeding from infallible first premises and deducing its way toward answers to legal problems. Unfortunately, “top down” reasoning bears no resemblance to the way in which humans learn language or master any linguistically based thought.

128. Law and Linguistics Conference, supra note 39, at 879 (statement of Frederick Schauer).
129. See Sanford Levinson, Law as Literature, 60 TEX. L. REV. 373, 384-86 (1982).
process. For a sense of the real link between law and language, we may
draw our inspiration from Lawrence Solan himself. Before applying his
linguistic expertise to legal problems, Solan studied childhood language
acquisition.\textsuperscript{134} The law will come much closer to appreciating linguistics
when it swaps its image of the linguist as a textual technician for an image
of the linguist as an interviewer of preschool children.

Chomskyan linguistics gives an introspective answer to Bertrand
Russell’s question about human knowledge: “How comes it that human
beings, whose contacts with the world are brief and personal and limited,
are nevertheless able to know as much as they do know?”\textsuperscript{135} The paradox
of childhood language acquisition presents a particularly acute “logical
problem”: How do children, even with limited, unstructured exposure to
samples of speech, nevertheless achieve complete mastery of the phonology
and syntax of adult language?\textsuperscript{136} Despite the vagaries of the English
language, any native speaker can boast:

A dreadful language? Man alive.
I’d mastered it when I was five.\textsuperscript{137}

Linguistic studies confirm common experience: a five-year-old native

\begin{footnotesize}
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\item \textsuperscript{136} See \textit{generally Explanation in Linguistics: The Logical Problem of Language Acquisition} (Norbert Hornstein & David Lightfoot eds., 1981); \textit{The Logical Problem of Language Acquisition} (C.L. Baker & John J. McCarthy eds., 1981). The logical problem of language acquisition provides the starting point for Chomskyan linguistics:

It seems clear that many children acquire first or second languages quite successfully even though no special care is taken to teach them and no special attention is given to their progress. It also seems apparent that much of the actual speech observed consists of fragments and deviant expressions of a variety of sorts. Thus it seems that a child must have the ability to “invent” a generative grammar that defines well-formedness and assigns interpretations to sentences even though the primary linguistic data that he uses . . . may . . . be deficient in various respects.

\textit{Chomsky, Aspects of the Theory of Syntax, supra} note 61, at 200-01.
\end{itemize}
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speaker can whip even the most thoroughly trained adult foreigner. What the child has acquired—and what the erudite foreigner has not and cannot—is the sense of a grand yet inarticulable order underlying her native tongue. Although most "ordinary speakers" of a language "are generally aware" of their own linguistic "conventions, and are unprepared to articulate them," they know an ungrammatical sentence when they hear one. Ordinary speakers also know that naked syntax does not a sentence make, as Chomsky illustrated with his famous example, "Colorless green ideas sleep furiously." The totality of these linguistic intuitions gives rise to "a feeling for a language, or Sprachgefühl." At a certain level of abstraction, the loose, multifaceted nature of a Sprachgefühl resembles Wittgenstein's notion of "familial relationship"; it is a network of similarities rather than a single, defining characteristic that distinguishes one language from another. A group that shares a Sprachgefühl constitutes the significant social unit in linguistics: the speech community. Such a community shares not only the underlying conventions of a common langue, but also the day-to-day interactions that make up their common parole. The speech community's web of phonologi-

138. See, e.g., R. Bley-Vroman, The Logical Problem of Foreign Language Learning, 20 LINGUISTIC ANAL. 3 (1990); M.H. Long, Natural Constraints on Language Development, 12 STUD. SECOND LANG. ACQUISITION 251 (1990); Elissa L. Newport, Maturational Constraints on Language Learning, 14 COGNITIVE SCI. 11 (1990). This evidence merits an observation and a recommendation on a particular application of linguistics to substantive law. Although children readily master a second language, this gift is a depleting asset. Immigrant children first exposed to English between the ages of 3 and 7 eventually speak English just as well as their American-born counterparts, but the magic spark of childhood language acquisition progressively dwindles until it is extinguished by puberty. Mandatory bilingual education limits the immigrant child's exposure to everyday English, thus retarding the child's mastery of the new language. A linguistically informed perspective suggests that legal measures mandating bilingual education serve less to safeguard the best interests of immigrant children and more to appease the political interests of immigrant parents. Cf. Jim Chen, Unloving, 80 IOWA L. REV. 145, 164-65 (1994) (discussing how different perceptions of assimilation can spark intergenerational disagreements within immigrant families).

139. Cunningham et al., supra note 2, at 1569.

140. Cf. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (retorting "I know it when I see it" in response to the criticism that the Supreme Court had failed to formulate a constitutional definition of obscenity).

141. CHOMSKY, SYNTACTIC STRUCTURES, supra note 75, at 15.

142. HøLMSLEV, supra note 56, at 44 (emphasis in original).

143. See Wittgenstein, supra note 67, § 66-71, at 31-34.

144. See DELL HYMES, FOUNDATIONS IN SOCIOLOGUISTRIC 51 (1974) (defining a speech community as "a community sharing knowledge of rules for the conduct and interpretation of speech"); Cunningham et al., supra note 2, at 1563 n.8.

145. See SAUSSURE, supra note 19, at 25-26, 112. I am liberally updating Saussure's "concept of langue as merely a systematic inventory of items" to include what Chomsky called "underlying
cal, morphological, and syntactic conventions comprise the first—and arguably the most enduring—set of rules that each human being acquires.

The logical problem of language acquisition is probably the most succinct, most accurate linguistic model of legal education. Learning the law is like learning a language. Call it a "foreign" language, since all law students come fully equipped with a natural language and none (presumably) have ever spoken the formal language of the law before matriculating. First-year classes in law school have the atmosphere of a Berlitz course; exotic words such as assumpsit and res ipsa loquitur fill the air, and selected images help acclimate students to the law as a "foreign" culture. Once law professors have finished giving basic semantic lessons in legal "vocabulary," they spend the remainder of available class time sharpening their students' grasp of the syntax of legal language—namely, the range and appropriate organization of arguments that legal decisionmakers are willing and able to credit. On occasion the law school as foreign language academy sends its students to a clinical "language lab," perhaps even on a fluency-building field trip by way of an internship or clerkship. Imagining legal education as an exercise in building foreign language competency captures the best sense of White and Cunningham's "translation" metaphor. An encounter between a native speaker and a foreigner forces the native speaker "to recognize [hidden linguistic] complexities" so that she can explain her speech community's linguistic conventions to the outsider. There may not be a more generous description of law teaching.

The duration and progression of legal education resemble those of primary language acquisition. Phonological development in children precedes morphological and syntactic development, as it must; like-

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146. Cf. Law and Linguistics Conference, supra note 39, at 810-11 (statement of Schauer) (noting that words such as “habeas corpus” and “assumpsit” have “plain or literal meanings within certain technical domains even though they are unknown to many speakers of standard English,” while others, such as “penalty” have, “in some domains, plain or literal meanings that diverge from the plain or literal meanings they would have in Standard English”).


148. Cunningham et al., supra note 2, at 1569 n.27.

149. For overviews of the far more heated debate over the priority of semantic or syntactic development in childhood language acquisition, see GENEVIÈVE BRAMAUD DU BOUCHERON, LA MÉMOIRE SEMANTIQUE DE L'ENFANT 19-20 (1981); GOODLICK, supra note 61, §§ 4.6-4.6.2, at 99-106.
wise, there is universal agreement that the first year of legal training must include an introduction to basic legal concepts such as the Hohfeldian classification of rights and duties. By the age of three, children "have a complex, structurally-based system [of syntactic knowledge] which obeys many of the principles governing the adult grammar."\(^{150}\) After three years, the legal academy catapults its students into the outside world. Virtually all law school graduates become duly licensed to practice law in one sense or another; some actually begin their careers by drafting legal opinions for the highest legal tribunals in the country. This presents a "logical problem" akin to that of childhood language acquisition: how can "the youthful . . . agents of House members, Senators, and Supreme Court Justices" be trusted to produce the country’s most significant "legislative and judicial documents"?\(^{151}\) The reason we survive the "surprising juvenescence" of the law\(^{152}\) may be that the young lawyer, like the child, has already acquired the underlying "syntax" of the law, primarily through unstructured, haphazard exposure to different examples of legal argument. Additional seasoning adds vocabulary and rhetorical sophistication, but three years are enough to equip law students with the basic intellectual tools of lawyering.\(^{153}\)

As with language, so with law. The linguistic parallel helps explain why "[r]easoning by analogy is the most familiar form of legal reasoning."\(^{154}\) The predominance of analogical reasoning in law leaves most lawyers "not able to explain the basis" for their legal judgments "in much depth or detail."\(^{155}\) Even in the absence of a "large-scale theory" of law, lawyers "reason anyway."\(^{156}\) Law as a linguistic process seeks something much

\(^{150}\) Goodluck, supra note 61, § 4.4.4, at 97.


\(^{153}\) Cf. Carol Chomsky, supra note 96 (arguing that important aspects of syntactic development continue throughout childhood, perhaps until puberty, even though children acquire the essentials of syntax quite early).


\(^{155}\) Id. at 747.

\(^{156}\) Id.
simpler and much more concrete than the lofty objectives set forth by top
down models of legal reasoning. One of Cunningham's variations on his
own translation theme describes the project quite well: "Is the interpretation
meaningful, does it make sense?"157 If a legal argument makes no sense,
either to the legal community that generates the argument or to the larger
community that submits to the law's binding force, it has as much place in
the law as an "ungrammatical" sentence does in natural language.

We don't think; we talk, we do. Roll over, Blackstone; Nietzsche
lives158—"conscious logic is only the 'most superficial part' of human
thought."159 Contrary to the pedantic dogma that inculcates "the habit of
thinking [about] what we are doing," "[c]ivilization advances by extending
the number of important operations which we can perform without thinking
about them."160 "[T]he human problem solver does not generally think
deductively or by exhaustive search of logical space."161 Rather, "real
human thinking" "constantly modify[s] and extend[s] by parallels, models,
and metaphors."162 The law's natural "focus on particulars" leads to
"incompletely theorized" judgments that nevertheless maintain a certain
consistency in decisional principles [operating] at a low or intermediate
level of abstraction.163 The survival instinct dictates as much: Even W.V.
Quine, despite belittling "[i]nduction" as a "not peculiarly intellectual"
activity, conceded that the virtue of simplicity in hypothesis and an "innate
sensitivity to certain traits" are both driven by "natural selection."164

The similarities that law shares with natural language also explain why
the barriers to entry into the law as an intellectual subculture are so
shockingly low. The short duration of American legal education and its

157. Cunningham, A Search for Common Sense, supra note 6, at 542.
158. Contra Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2523 (1993) (Scalia, J.,
concurring) (boasting that "the original and enduring American" vision of law "sprang not from
the philosophy of Nietzsche but from the jurisprudence of Blackstone").
and contrasting Nietzsche with 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND
**63-92 (Thomas Green ed., 1979)).
160. Friedrich A. Hayek, The Use of Knowledge in Society, 35 AM. ECON. REV. 519, 528 (1945)
(quoting Alfred North Whitehead for this observation).
161. Mary Hesse, Theories, Family Resemblances, and Analogy, in ANALOGICAL REASONING:
PERSPECTIVES OF ARTIFICIAL INTELLIGENCE, COGNITIVE SCIENCE, AND PHILOSOPHY 317, 317 (David
162. Id. at 318.
163. Sunstein, supra note 154, at 746-47.
164. QUINE & ULLIAN, supra note 135, at 73, 88.
potentially high financial rewards have attracted numerous scholars whose
first love is something, anything, besides the law. Although the base
prose of appellate court decisions and law review articles suggests
otherwise, the law nurtures numerous refugees from the economically
depressed worlds of the language arts. The impressive number of
nonlawyers who have commented intelligently on legal subjects testifies to
the relative ease of acquiring law as a second language. These trends
suggest that lawyers and legal educators might profitably reorient their
culture as one based on artistic inference rather than the rigid, deductive
dogma of social science. The flowering of law and economics is not
contrary evidence; honestly practiced, economics is a branch of rhetoric
rather than a precise science.

"Top down," foundationalist approaches to interpretation should be the
first victim of the triumph of art over social science as an intellectual
model for the law. Understanding the dynamics of "ordinary language"
leads not to a dogma dominated by a false promise of "plain meaning," but
a much more pragmatic, "bottom up" vision of legal interpretation.
Ironically, the antitextualist approach called "practical reason" is the
interpretive methodology that most resembles language acquisition in
practice. By outperforming every foundational theory of statutory
interpretation in predicting what the courts of law will do in fact, practical
reason has come closer than any other approach to achieving "explanatory
adequacy." The legal instinct that propels practical reason has survived
numerous efforts to redefine American law according to the arbitrary
dictates of one grand theory or another. Practical reason owes this
durability to the analogical process. As in language, analogy in law "does

165. See Posner, supra note 51, at 1510-11.
166. See DONALD N. MCCLOSKEY, THE RHETORIC OF ECONOMICS 54-86 (1985) (showing how even
the econometrically vaunted rational expectations hypothesis, see John F. Muth, Rational Expectations
and the Theory of Price Movements, 29 ECONOMETRICA 315 (1961), is at heart an exercise in the art
of rhetorical persuasion); cf Posner, supra note 24, at 309-16 (defending the potential rhetorical
richness of economic analysis of law).
167. Cf Sunstein, supra note 154, at 746 (arguing that analogical legal reasoning "develop[ed] from
concrete controversies" constitutes "a version of "bottom-up" thinking").
168. See generally Daniel A. Farber, The Inevitability of Practical Reason: Statutes, Formalism,
169. Compare Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 461 (1897)
describing law as the project of predicting "what the courts will do in fact, and nothing more
pretentious") with Chomsky, Current Issues in Linguistic Theory, supra note 79, at 63 (arguing that a
linguistic theory achieves "explanatory adequacy" when it outperforms other theories in synthesizing
"the relevant observed data" into "an explanation for the linguistic intuition of the native speaker").
not create new [logical] patterns; it simply extends the range of a pattern which already exists." 170 In a very real sense, the scholars who have observed how legal rhetoric tends to follow a bottom-up "funnel of abstraction" are the Noam Chomskys of the law, the pioneers of a linguistically informed study of legal universals. 171

V. ASPECTS OF A THEORY OF LEGAL SYNTAX

A. Rhetorical Structures

Can the analogy between language and law be stretched beyond its limits? Law is not a natural language; there are no known biological restraints on learning law comparable to the "critical period" for language acquisition during the human life cycle. 172 Nonlinguistic factors undeniably influence the law. The entire field of statutory interpretation consists of one endless debate over the proper balance between the linguistic and the contextual. Hence the prominent role of pragmatism in legal scholarship on statutory interpretation and the prominent role of pragmatists in the law and linguistics movement.

There may be an even greater barrier. As my colleague Phil Frickey concludes in his contribution to this symposium, law is normative to the core. 173 By its own terms, linguistics merely describes. As such, it says nothing about the normative content of language, much less of law. Frickey's brute logic carries him toward the apparently unavoidable conclusion that the law exhausts the useful role of linguists "once the empirical questions are analyzed with their help and the issues turn normative." 174 Once again, however, we can cheat fate by changing our perspective. At a different level of abstraction, we might see that linguistics

170. Crystal, supra note 76, § 54, at 330.
172. See, e.g., Eric H. Lenneberg, Biological Foundations of Language (1967); Pinker, supra note 104, at 37-38, 290-96; S. Krashen, Lateralization, Language Learning and the Critical Period: Some New Evidence, 23 Language Learning 63 (1973); see also sources cited supra note 138 (describing age-based differences in the ability to acquire a foreign language); cf. Susan Curtiss, Genie: A Psycholinguistic Study of a Modern-Day "Wild Child" (1977) (describing the permanent linguistic disability of a girl who was not exposed to human language until she was more than thirteen years old).
174. Id. at 1094.
offers the law a powerful explanatory framework by which to analyze statutory disputes.

Structurally speaking, law learning and language acquisition are quite similar. The logical problem of legal education—how one learns to generate creative legal arguments after being exposed to a limited number of concrete legal controversies—is a highly stylized variation on the theme of childhood language acquisition. If both law and language acquisition are bottom up, inductive learning processes that exploit an underlying grammatical instinct, the insight that statutory interpretation as practical reasoning yields argumentative universals suggests the possibility of a "grammar" that guides legal reasoning and rhetoric. It matters little whether our sense of justice originates from a biological wellspring (a truly "natural" law) or must be cultivated through a form of republican education. For now, the task before us is simply to imagine how a legal grammar might look.

Perhaps we have let ourselves be blinded by the genius of others and by our own venality. The sheer technical prowess of existing law and linguistics scholarship may mislead the careless observer into dismissing linguistic analysis as a scientific apology for the new textualism. Lulled into complacency by deconstructionist ideology, many nontextualist legal scholars assume that the search for meaning is the intellectual opium of the right. Mistaken inferences and ideological stubbornness are costly indulgences, for we shall surely overlook the marvel that is unfolding before us. We stand on the verge of imagining a generative "grammar" for the law, uniquely tailored to the political morphology and rhetorical syntax of a system of justice. With further thought and several leaps of faith, we might sketch a legal grammar blissfully unencumbered by the confusion that accompanies discussions of linguistic "meaning," conventional, ordinary, or plain.

We already have the building blocks of a primitive legal grammar. Among existing approaches to statutory interpretation, practical reasoning best reflects the dynamics of natural language acquisition. A legal grammar


that elaborates the "funnel of abstraction" already sketched by William Eskridge and Philip Frickey would, in the best linguistic tradition, describe the structure of interpretive arguments without prescribing a "foundational" vision of legal norms.177 Thanks to these two scholars we can begin visualizing the semantic and syntactical building blocks of legal argument. By combining a semantic system inspired by Eskridge's notion of regulatory variables with a syntactic structure that reflects what Frickey calls the "faithlessness" of the law, we can anticipate the order and content of politically "grammatical" legal arguments—arguments that meet the essential expectations of the law's relevant political communities.

As a start, we can transform Eskridge's concept of the "regulatory variable" into the basic semantic unit of our legal grammar.178 An expanded notion of regulatory variable can include not only text but also all of the myriad nontextual constraints on statutory interpretation. The "interpretive canons," so crucial to the two-step judicial approach of the new textualism179 and widely regarded to be among the law's most malleable decisional tools,180 are readily reimagined as quintessential regulatory variables. The product of "an interpretive regime that has been created systematically by [common law] courts over the centuries,"181 the canons have acquired the characteristics of folksayings, or compact summaries of broad but contextually contingent truths.182 Over time, how one canon or another changes "ordinary meaning" into "legal meaning" becomes so imperceptible that an "established" canon can be regarded as the interpretive equivalent of statutory text.183 Through this evolutive process, the canons have become an important repository of "public values" drawn from constitutional, statutory, and common law.184


182. See SAMUEL MERMIN, LAW AND THE LEGAL SYSTEM: AN INTRODUCTION 264 (2d ed. 1982).

183. Cf. HJELMSLEV, supra note 56, at 128-29 (describing how sound laws such as Grimm's Law or Verner's Law become so entrenched in a particular language's phonology that they become "law[s] of state" rather than "law[s] of change").

Defining the syntactic component of a legal grammar requires more work. In this symposium, Phil Frickey convincingly argues that the project of statutory interpretation must be evaluated according to its “faithfulness” to something besides a nebulous, quasilingualistic “construct” such as a hypothetically “‘autonomous’ text, or conventional usage, or authorial intent.” 85 Even the Supreme Court’s most vocal proponents of the new textualism have conceded the legitimacy of nontextual factors in statutory interpretation. 86 Frickey notes that the law, unlike any natural language, addresses two separate communities and thereby attempts to accomplish two, frequently contradictory goals. The law tries to speak simultaneously to the ordinary “citizenry” and to the “enforcement officers and judges” who are charged with the power and the discretion “to maximize justice in widely divergent circumstances.” 87 Evidently the law speaks not only to the “speech community [of the contemporaneous set of literate and well-educated native speakers of English in the United States],” but also to “the smaller professional subset of lawyers and judges” who are likely to understand “technical legal meaning.” 88

This dialogue between legal scholars and linguists has exposed the yawning gap between the law’s dual speech communities. The conference discussion of H.L.A. Hart’s famous “no vehicles in the park” problem 89 revealed an especially telling contrast. According to the linguists, the true experts on the subject, the ordinary person would describe the statutory term vehicles as one that includes the ambulance rushing in to save a heart

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85. Frickey, supra note 111, at 1094.
86. See, e.g., Staples v. United States, 114 S. Ct. 1793, 1804 (1994) (Thomas, J., for the Court) (invoking the rule of lenity); United States v. R.L.C., 503 U.S. 291, 307-08 (1992) (Scalia, J., concurring in the judgment, joined by Kennedy and Thomas, JJ.) (arguing that the rule of lenity cannot be overcome by contrary legislative history); Public Citizen v. United States Dep’t of Justice, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in the judgment, joined by Rehnquist, C.J., and O’Connor, J.) (“Where the plain language of the statute would lead to ‘patently absurd consequences’ that ‘Congress could not possibly have intended,’ we need not apply the language in such a fashion.”) (citations omitted).
87. Frickey, supra note 111, at 1086; see also id. at 1085 n.2 (distinguishing between “members of the citizenry subject to the primary duty” created by a statute and “primary enforcement officials such as the police”); Law and Linguistics Conference, supra note 39, at 872 (statement of Eskridge) (“Who is the audience for the canons [of statutory interpretation]? It seems to me the audience for the canons [is] not only other judges, but also Congress and the population.”).
88. Cunningham et al., supra note 2, at 1563 n.8; cf. Law and Linguistics Conference, supra note 39, at 824 (describing the Supreme Court “as a very tiny, but important linguistic community”) (statement of Cunningham).
attack victim in the park. None, from a strictly linguistic point of view, could imagine how the category *vehicles* could exclude the ambulance. By contrast, any good lawyer can imagine several plausible ways to exempt the ambulance, even if she finds some or all such arguments unconvincing. There is no serious *linguistic* debate over the meaning of the sentence, “No vehicles in the park.” What the lawyers are really doing is debating whether to punish the ambulance driver (which no one but a diehard positivist would do) and, more significantly, how to justify a decision *not* to punish the driver once the legal debate (quickly) reaches this apparent political consensus.

Unlike the linguist, the lawyer is aware of pragmatic legal barriers to convicting the ambulance driver, such as prosecutorial discretion, qualified immunity, or a justification defense—and of the possibility that judicial interpretation of the statute can supplement or short-circuit these *ad hoc* legal devices. Only the lawyer is engaging in a quasilinguistic, highly normative form of reasoning that balances linguistic understanding with nakedly political judgments and thereby attempts, with no guarantee of success, to reconcile any differences. Unless we can bring this “interpretive process . . . to conscious awareness,” lawyers and linguists alike “could understandably conclude that those offering [a competing] interpretation” of the same legal text “either do not know how to read or are being intentionally dishonest.”

The real legal battle over the ambulance has nothing to do with the statute’s linguistic meaning. From the citizen’s point of view, the question is whether we wish to deter ambulance crews or even medically trained bystanders from driving into an otherwise all-pedestrian park when human life is at stake. As a matter of law enforcement, the question is whether the decision to prosecute in circumstances such as these can be safely entrusted to the discretion of executive officers, or whether the judiciary must announce a rule against criminal liability lest overzealous or heartless prosecutors punish comparable violations in the future. For instance, to a court predisposed to describe any legal violation by the ambulance as a *de minimis* infraction, the very fact that the question has reached a court is evidence that prosecutors will not exercise their discretion wisely. These are purely normative questions that presuppose the empirically verifiable linguistic truth that *vehicle* includes an ambulance. The confusion arises when lawyers use the judicial shorthand of saying that *vehicle* excludes an

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190. Cunningham et al., *supra* note 2, at 1584.
ambulance that enters the park under exigent circumstances. A court that makes this statement is not making a scientific judgment on the definition of vehicle; it is making a normative judgment on the extent to which society ought to bend an otherwise obvious and established rule. The greatest potential for legal misuse of language lies not in the failure to consult the statutory language, but in the temptation to disguise the law’s inescapably normative judgments as objective quests for linguistic truth.

The context in which Clark Cunningham first performed linguistics analysis of law provides another example. We can easily reframe the question raised in Warden v. Hayden—whether a warrantless search made in the course of a “hot pursuit” is nevertheless constitutionally sound—in quasilinguistic terms. Is such a warrantless search unreasonable within the meaning of the fourth amendment? Or perhaps we could ask whether a search took place at all, again within the meaning of the fourth amendment. The constitutional debate, however, does not turn on the linguistic meaning of search, seizure, unreasonable, or warrant. Every native speaker of American English knows these simple words and is prepared to debate their meaning, even in this legal context.

Warden v. Hayden implied as much when it rejected the sterile legal distinction between “mere evidence” and “fruits and instrumentalities” as a workable definition of seizure.

On the other hand, opinions regarding particular police practices will differ within the law’s relevant political communities. Just how meticulous police officers have to be when pursuing a fleeing felon or perishable evidence is a question of values. The confusion arises from that ever so used and useful legal phrase,
within the meaning of." But for the Bill of Rights, the regulation vel non of police behavior during hot pursuits would be the exclusive province of legislative and executive policymakers. The constitutional jurisprudence of searches and seizures merely substitutes the judicially dominated common law for a decisionmaking process conducted by the other branches of government. As a matter of political self-preservation, the judiciary has every incentive to describe its case law as an objective quest for linguistic meaning rather than a palpably antidemocratic debate over proper police procedure. Solan rightly described his mission in The Language of Judges in political rather than linguistic terms: "The issue . . . is . . . how judges attempt to mask the fact that a case is hard in the first place." More often than not, the quasiscientific rhetoric of a judicial opinion masks a discretionary political judgment behind a veil of apparent linguistic compulsion. The jargon of critical legal studies states the proposition well: legal invocations of linguistic meaning deny the contingency of the law.

B. A Lecture on Government and Blinding

Is the law so fraudulent that "plain" or "ordinary" language plays no role? Hardly! By the same token, no extent legal system rests on language alone to the complete exclusion of the unspoken and the unwritten. Although the law aspires to be understood as ordinary language by the public at large, virtually every interpretive approach incorporates nontextual components. The prospect of a "literal," purely textual legal system is too horrible to contemplate except as a caricature. In its more sophisticated incarnations, the new textualism neither asserts the infallibility of plain language nor disclaims all reliance on nonlinguistic factors in interpretation. Frank Easterbrook, a founder of the new textualism and one of its most prominent judicial practitioners, has rested his philosophy "not on a silly belief that texts have timeless meanings divorced from their many useful" for providing electrical service).

198. SOLAN, THE LANGUAGE OF JUDGES, supra note 3, at 208 n.10.
contexts, . . . but on the constitutional allocation of powers." 202 This bit of honest legal realism offers us hope for bridging the chasm between law and language.

Let us eschew the tempting of academia, the formalist seduction of the law. 203 Law does not live by words alone, but on every value given voice through participatory politics. 204 The "language" of law is not language as such. Rather, it is a bundle of independent political values, embodied not only in statutory language but also in "extratextual" doctrines. A stated preference for textual analysis carries only the normative weight that is implicit in the policy "baseline" from which interpretation begins. 205 The tension between two familiar interpretive canons illustrates the point. The canon that statutes in derogation of the common law should be narrowly construed premises that citizens have organized their private affairs according to understandings that predate a relatively recent statute. The opposing canon, which urges liberal construction of remedial statutes, presumes that discoverable, popularly enacted statutes provide a better matrix by which to organize a system of private ordering. The language of the statute—its nonlegal, "conventional," "ordinary," or "plain" meaning—has not changed. The interpreter's values are the crucial—and variable—factor.

The court's split institutional personality also distorts the apparent significance of statutory language. In order to describe how an interpreting court reconciles its conflicting institutional responsibilities, we can modify Walker Percy's model for describing the link between a symbol and the symbolized object. While in the well-house, Helen Keller tried to match the water that was flowing over one hand with the symbol water that was being formed in the other. Similarly, in this age of statutes, the legal project most often consists of interpreter's effort to match statutory language with the legal "meaning" of that statute. But the judicial interpreter at the fulcrum of the legal Delta phenomenon is attempting to make a second, crucial reconciliation. She is trying to communicate, through the legal

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202 In re Sinclair, 870 F.2d 1340, 1344 (7th Cir. 1989) (Easterbrook, J.).
204 Cf. Deut. 8:3; Matt. 4:4; Luke 4:4.
205 For an illuminating application of the baseline concept, see Cass R. Sunstein, Lochner's Legacy, 87 COLUM. L. REV. 873, 874 (1987) (noting how Lochnerian adjudication favored a norm of "government inaction" in order to preserve "the existing distribution of wealth and entitlements" based on "the baseline set by the common law").
language of the judicial opinion, the "meaning" of the statute to two distinct audiences: the populace bound by primary legal duties as well as the administrative apparatus charged with the obligation to enforce the law. This is why "[h]ypotheticals about domestic employees instructed to fetch soupmeat, however informative about communication in nonlegal contexts, do not seem . . . to capture the heart of the problem when the coercive power of the law is involved."206 The principal concern "is political rather than epistemological or hermeneutic."207

We need to realign the traditional distinction between the textual and the nontextual according to the law's political dualism. Lawyers and academics across the ideological spectrum have failed to articulate the political function of text. The most slavish supporters of the new textualism defend their technique as an "apolitical" interpretive approach. For their part, proponents of competing interpretive techniques have undervalued the political significance of statutory language, perhaps in an overzealous effort to offset the new textualism's more outlandish normative claims. The significance of text becomes much clearer once we consider how the interpreter at the center of any legal dispute must serve multiple constituencies.

In a society where citizens presumably read the law,208 statutory language *is* the law. "Ordinary" language—unmodified by substantive concerns regarding federalism, separation of powers, or other constitutional concerns—is what the law says and what the law means. A judicial search for "ordinary meaning" comes closest to capturing the intent of the enacting legislature, whose members are presumably the most direct representatives of the citizenry. Honoring the ordinary citizen's unassisted reading of a statute best serves the rule of law. This process so closely resembles the naming function in ordinary language that we may call it the "noun phrase" or the "subject" in an interpretive "sentence," an exercise in statutory interpretation. Because the vast majority of human beings speak a language that tends to place the subject before the verb in simple sentences,209 let

206. Frickey, *supra* note 111, at 1089 (footnote omitted). For discussions of the soupmeat hypothetical, see sources cited *supra* notes 68 and 69.


209. See CRYSTAL, *supra* note 76, § 16, at 98 (estimating that 75 percent of human languages, including many of the most widely spoken, that impose a structure on word order tend to place the

us place this "noun phrase" on the left side of our legal grammar.

By contrast, the specialized law enforcement audience recognizes that the law is not only a body of statutory language, but also a mass of legal principles that modifies legal language. Some, such as the rule of lenity, arise from constitutional concerns; others, such as a preference for liberal application of antitrust policy, give voice to policy preferences readily inferred by judges from the entire body of statutory law. The constitutional canons condense the best of common law wisdom; the statutory canons seem to exploit the transplanted civilian concept of the "equity of a statute." Because these regulatory variables modify and rechannel the meaning of statutory language as the legal "noun" of every interpretive "sentence," let us call this the "verb phrase" of our legal grammar and place it to the right.

The two halves of every interpretive "sentence" are at war with each other. Frickey succinctly describes the problem of reconciling the two sides as a crisis of faith, for no judge can serve two masters. As Paul Campos states the dilemma, a judge either interprets a legal text as the agent of the drafting legislature or else engages in the altogether different enterprise of "reauthoring" the text. The legal interpreter day by day must choose "one of these things tway": the faithful but ugly, or the beautiful but unfaithful. "Faithful," literal statutory readings offend broader legal values, but more equitably cogent interpretations do greater violence to legal text.

As with natural languages, some legal grammars tend to elaborate the left

subject before the verb).


212. For examples of how courts treat codes or related statutes as sources of principled law, see Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970); Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975).


215. See Campos, supra note 26, at 1093.

216. GEOFFREY CHAUCER, THE CANTERBURY TALES 182 (Michael Murphy ed., 1991) ("Choose now," quod she, "one of these things tway: / To have me foul and old till that I die, / And be to you a true, humble wife, / And never you displease in all my life; / Or else you will have me young and fair, / And take your aventure of the repair / That shall be to your house because of me, / (Or in some other place it may well be)."
branch, while others orient themselves toward the right. Natural languages that tend to place the subject before the verb have three possible positions for the object: (1) after both the subject and the verb, or SVO, (2) between the subject and the verb, or SOV, or (3) before both the subject and the verb, or OSV. Though theoretically possible, OSV syntax is so rare among human languages that its use in The Empire Strikes Back and The Return of the Jedi gives the extraterrestrial Yoda a truly exotic aura in these movies. On the fiftieth anniversary of V-J Day, we can avoid both a war of words and a war of the worlds by confining ourselves to the syntactic patterns represented by the leading languages of World War II. SVO languages such as English and French are “right-branching” in the sense that the head of a phrase appears on the left and modifying material accumulates to the right. In right-branching languages, relative clauses follow the noun they modify. By contrast, SOV languages such as Japanese and, to a much lesser extent, German are “left-branching” in that they plant the head of a phrase on the right and extend modifications toward the left. Relative clauses thus precede the noun they modify.

To see the difference, compare the following sentences in English and in Japanese:

English (right-branching): The lawyer who studies linguistics will succeed.

Japanese (left-branching): Gengogaku o benkyoshita bengoshi-wa seikosuru.

Morphological gloss: Linguistics has studied lawyer-subject will succeed.

In English, the noun lawyer serves as the head of the sentence; both the modifying phrase who studies linguistics and the verb phrase will succeed follow the head. In Japanese, the two verbs benkyoshita (“study”) and seikosuru (“succeed”) anchor the subordinate clause and the independent clause, and modifying material is built up before, or to the left of, these heads.

As applied to law, the distinction between right- and left-branching

217. See THE EMPIRE STRIKES BACK (Twentieth Century Fox 1981); THE RETURN OF THE JEDI (Twentieth Century Fox 1983).

218. See CRYSTAL, supra note 76, § 16, at 98 (quoting Yoda as saying, among other things, “When nine hundred years you reach, look as good you will not”).

219. See GOODLUCK, supra note 61, § 4.1.1, at 63; see also id. § 4.6.1, at 103 (noting that VSO languages share the right-branching tendencies of SVO languages).

220. See id. § 4.1.1, at 63.
separates text from context, the "plain meaning" of a statute from a "same reading" of a statute. Practical reason's funnel of abstraction posits that virtually every effort to interpret a statute in the United States begins by examining statutory text and moves through progressively less authoritative indicators of statutory meaning. Syntactically speaking, American legal rhetoric puts textual "subjects" before nontextual "verbs." But S-V languages can feel quite different, thanks to the difference between right-branching syntax and left-branching syntax. There may be a similar divide in American law. A right-branching system of legal rhetoric places the "head" of each interpretive sentence on the left side of our legal grammar, in the rule-of-law "noun phrase." The placement of the head to the left suggests a paramount interest in legislative supremacy, and a rightward sweep through nontextual regulatory variables links the interest in the rule of law with the process-oriented and substantive interests expressed in the institutional "verb phrase" on the right side. By contrast, a left-branching system of legal rhetoric declares a broader institutional interest as the "head" of the interpretive process and then pivots leftward through other regulatory variables, including rule-of-law values implicit in a commitment to legal texts.

How do established approaches to statutory interpretation fit within this sort of analysis? As a matter of vocabulary alone, the legal process technique perfected by Hart and Sacks seems replete with process- or policy-oriented interpretive doctrines that dominate the "verbal" branch of our legal grammar. Witness the prominence of the lenity and constitutionality canons in the legal process literature. As a matter of method, The Legal Process explicitly prescribes a left-branching approach. Consider Hart and Sacks's "concise statement of the task" that confronts the judicial interpreter:

In interpreting a statute a court should:
1. Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then
2. Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either —
   (a) a meaning they will not bear, or
   (b) a meaning which would violate an established policy of clear statement.

221. See sources cited supra note 171.
222. HART & SACKS, supra note 69, at 1374 (emphasis added).
By declaring statutory purpose to be the primary goal of statutory orientation, legal process plants the rhetorical pivot of its interpretive methodology at the far right end. Although Hart and Sacks's second step implies a preference for textual integrity over "established policies of clear statement," this single right-branching tendency does not offset the overarching left-branching proclivity of legal process.\(^{223}\) The judicial assumption "that the legislature [is] made up of reasonable persons pursuing reasonable purposes reasonably" dominates any textually based, rule-of-law interest.\(^{224}\) Indeed, Hart and Sacks explicitly conceded that "[t]he meaning of words can almost always be narrowed if the context seems to call for narrowing."\(^{225}\)

The new textualism provides an interesting contrast—and exhibits some startling similarities. Its "noun-" or "text-heavy" vocabulary suggests that textualist judges guide their readings of statutory language primarily by "adjectival" textual canons such as *eiusdem generis*, *noscitur a sociis*, and *expressio unius est exclusio alterius*.\(^{226}\) By its terms, the new textualism proclaims a right-branching methodology:

>[F]irst, find the ordinary meaning of [a statute's] language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.\(^{227}\)

Unlike the legal process formula, the textualist recipe puts statutory language at the head of its interpretive sentences. This is the hallmark of a right-branching system of legal rhetoric: The rule of law rests on textual primacy and legislative supremacy.\(^{228}\) If the new textualism limited its

\(^{223}\) Cf. Goodluck, supra note 61, § 4.1.1, at 64 (noting that the organization of phrases frequently deviates from the pattern suggested by the overall right- or left-branching tendency of a language and describing the placement of adjectives before nouns in English as one such deviation from the general right-branching pattern of the language).

\(^{224}\) Hart & Sacks, supra note 69, at 1378.

\(^{225}\) Id. at 1376.

\(^{226}\) See, e.g., Thomas W. Merrill, Textualism and the Future of the Chevron Doctrine, 72 Wash. U. L.Q. 351, 372 (1994) ("The [textualist's] task is to assemble the various pieces of linguistic data, dictionary definitions, and canons into the best . . . account of the meaning of the statute. This exercise places a great premium on cleverness.");


arsenal of canons to the text-based, intrinsic variety—or at least cabined its use of more explicitly nontextual regulatory variables—it might live up to its billing. But the new textualism consistently undermines its stated right-branching approach by its increasing reliance on clear statement rules and other constitutionally informed substantive canons. The Rehnquist Court's predilection for the rule of lenity and similar canons contradicts "the rule-of-law value in following statutory text." These patently purposive concerns have become so prominent that the new textualism as practiced now follows a left-branching rhetorical syntax that is structurally indistinguishable from that of The Legal Process.

This remarkable confluence between legal process and the new textualism suggests that the natural orientation of statutory interpretation in the United States is purposive and left-branching. After a decade in power, the new textualism's effort to reverse the rational flow of American public law has apparently failed to loosen the grip of traditional legal process. More likely, the new textualism never had the will to power. It could not muster the supernatural strength to overcome the human, all too human, allure of the common law and the value-shaping power that the common law vests in courts. Throughout its ascendance, the Rehnquist Court has not used its authority to "articulat[e] . . . a text-based rule of law," but rather to enforce an "economic libertarian, anti-regulatory philosophy" that is as consciously political as Karl Llewellyn himself. She who would reverse the rhetorical flow of the Supreme Court, she who would "be a creator in good and evil" must first "be a destroyer and break values." This the Rehnquist Court has not done and probably cannot do. Rather, like the child learning to speak her mother tongue, it has internalized the prevailing left-branching syntax of American law and creatively inserted regulatory variables better suited to effecting its policy preferences. Ecce lex: By manipulating the "rhetoric of purpose" that pervades "each category of


229. See William N. Eskridge, Jr. & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593 (1992); cf. Eskridge & Frickey, supra note 11, at 81-87 (describing the current Supreme Court's regime of clear statement rules as "the Stealth Constitution").

230. Eskridge & Frickey, supra note 11, at 71.

231. See Frickey, supra note 111, at 1090 ("The more one accepts canons aimed at promoting functional and practical interpretation, the more this kind of textualism begins to merge with other theories of interpretation.").

232. Eskridge & Frickey, supra note 11, at 75.

statutory adjudication"—"constitutional judicial review, statutory interpretation, and administrative judicial review"—the Justices "ascribe a statutory purpose whose nature and scope enables the court to reach a foreordained outcome."234

Perhaps the best indicator of American law's left-branching tendencies comes from neither end of today's ideological spectrum, but from its dead center. Consider the following opening gambits from the opinions of that eternal moderate, Sandra Day O'Connor:

This is a case about federalism.235
As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.236
This case implicates one of our Nation's newest problems of public policy and perhaps our oldest question of constitutional law.237
Liberty finds no refuge in a jurisprudence of doubt.238

Whatever else one might say about Justice O'Connor, this much is undeniable. She is blunt. The paramount political values underlying this admittedly limited but seemingly diverse sampling of her opinions, stretching from habeas corpus to substantive due process and the Tenth Amendment, appear to be federalism and stare decisis. It is hard to imagine legal interests further removed from the simple rule-of-law notion that animates the new textualism and other invocations of "plain meaning."239
It may well be, as the funnel of abstraction suggests, that the American judicial opinion organizes itself superficially by starting with text and moving toward less authoritative indicia of statutory meaning. But the equally consistent emergence of decisive nontextual doctrines in law suggests that the deep structure of American legal thought plants itself on a nontextual mooring and pivots leftward in search of textual support for decisive preferences internal to the judicial interpreter.

At first glance, the disparity between legal reasoning and opinion-writing seems counterintuitive. How possibly can judges think in a left-branching,

239. See, e.g., Frank H. Easterbrook, Ways of Criticizing the Court, 95 HARV. L. REV. 802, 820 (criticizing the way in which adherence to stare decisis allows the fortuitous timing of cases to affect the substantive content of the law).
purposive way, only to write opinions as though they followed a right-
branching, text-centered methodology? This is the legal equivalent of
thinking Japanese and speaking French. Again, it bears remembering that
although legal thought resembles linguistic thought, the law is not a natural
language. 240 There is a vastly greater time lapse between judicial decision
and opinion-writing than between thought and speech. In a system of
justice whose highest court can decide as many as twenty cases in minutes
and then spend weeks or months crafting its opinions, 241 there is ample
time to translate raw instinct into refined legal prose—and thereby to filter
out any "impurities" that suggest the real nature of the judicial process.
Usually, any crucial disparities between the initial, instinctive decision and
the more calculated opinion will manifest themselves in the form of dissent
increasingly favored by Justice Antonin Scalia, the concurrence in the
judgment. 242 Only on the rarest occasions, when the battle over the post
hoc rationalization of a decision involves far greater stakes than the
outcome as such, does the otherwise hidden transformation of legal
reasoning into legal language become obvious. 243

One question remains: Why? If American legal thought truly tends to be
purposive and left-branching, why do judges and lawyers tend to organize
their arguments according to a text-centered, right-branching system of
rhetoric? Why does the funnel of abstraction capture the expression but not
the underlying, dispositive logic of legal process, new textualism, or the
moderate judicial philosophy of an O'Connor-like moderate? Without
purporting to give a complete answer, I submit that the problem lies in
American law's continuing struggle to reconcile its nominal fidelity to
legislative supremacy and democratic accountability with its lingering belief

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240. Cf. PINKER, supra note 104, at 189 ("[A]lthough language is an instinct, written language is
not.").

241. See BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT
438-41 (1979) (contrasting the "twenty minutes" that the Justices spent in conference with the far more
painstaking opinion-writing process that yielded five landmark death penalty decisions on July 2, 1976:
(1976)).

242. See Chen, supra note 151, at 289. See generally John F. Davis & William L. Reynolds,
Jurisdictional Cripples: Plurality Opinions in the Supreme Court, 1974 DUKE L.J. 59; Ken Kimura, Note,

U.S. 1 (1989); David Post & Steven C. Salop, Rowing Against the Tidewater: A Theory of Voting by
Multijudge Panels, 80 GEO. L.J. 743 (1992); John M. Rogers, "I Vote This Way Because I'm Wrong":
The Supreme Court Justice as Epimenides, 79 KY. L.J. 439 (1990-91).
that only common law judges can achieve a rational, depoliticized legal system. Statutory interpretation in a common law system desperately wants to acknowledge legislative supremacy but cannot renounce the historical primacy of judge-made law. The tension is most salient in "legisprudential" doctrines such as stare decisis, 244 judicial prospectivity, 245 and statutory retroactivity 246—the most fragile points of conflict between statutes and common law as sources of primary rights and duties. 247 My poorly informed guess is that right-branching legal reasoning and rhetoric flourish together in civil law jurisdictions, where statutes unencumbered by a common law backdrop act not only as sources of public policy but also as principled law. 248 This initial effort at charting American judicial reasoning as a linguistically guided process suggests that our jurisprudential legal system, is trying once again to heed multiple voices, to serve multiple masters, to be faithful to multiple lovers. On this point, there is little that linguistics can add to the wisdom already accumulated in the law of agency and the lore of love.

VI. THE WORD MADE FLESH

If indeed "[t]he law is a profession of words," 249 it cannot and ought not limit its relationship with linguistics to hermeneutic games invented by language philosophers and other amateur linguists. The founders of the law and linguistics movement have taught us how to analyze "the actual use of language in concrete [legal] situations." 250 As we perfect their technique, we should move steadily from the study of legal performance to a comprehensive examination of legal competence, of the language-fueled engine that drives the enormously creative legal mind. From the limited set of decided cases, let us attempt to infer "the underlying system of [formal] rules," implicit political values, and accepted rhetorical devices by which

247. See generally Eskridge & Frickey, supra note 68, at 423-81.
248. See generally sources cited supra note 213.
interpretive "speaker-hearer[s]" shape the law.\textsuperscript{251} As this literature matures, "we may see in retrospect that we moved toward the understanding of the general conditions on [legal] structures by the detailed investigation of one or another 'concrete' realization."\textsuperscript{252}

The apparent division between legal rhetoric and legal reasoning suggests that the law's underlying syntax observes the Chomskyan distinction between surface structure (or S-structure) and deep structure (or D-structure).\textsuperscript{253} The complex interaction between formal, institutional, and pragmatic factors in statutory interpretation may reach a depth that parallels the third level of Chomskyan grammar—LF, or logical form.\textsuperscript{254} Acknowledging the wedge between legal thought and legal expression provides a valuable first step toward a more complete understanding of law as a species of language acquisition. The next step will surely require a more systematic exploration of relationships between regulatory variables. Doctrines permitting "plain text" to defeat extratextual factors such as the rule of lenity\textsuperscript{255} or deference to agency interpretation\textsuperscript{256} suggest that there may be legal analogues to linguistic rules of government and binding—the rules that control the interactions between nouns and verbs, pronouns and antecedents, and the like.\textsuperscript{257} As the investigation widens, its focus may paradoxically narrow; if indeed there is a grammar underlying legal thought, we might eventually conclude that it, like its linguistic counterpart UG, permits "only a finite set of possible core grammars,"\textsuperscript{258} a limited number of politically tenable approaches to the universal "enterprise of subjecting human conduct to rules."\textsuperscript{259}

As applied to law, the intellectual tools used in the quest for linguistic universals have excavated a hollow core. There are no fixed stars in

\begin{itemize}
\item \textsuperscript{251} Id.
\item \textsuperscript{252} NOAM CHOMSKY, ESSAYS ON FORM AND INTERPRETATION 207 (1977)
\item \textsuperscript{253} See CHOMSKY, LECTURES ON GOVERNMENT AND BINDING, supra note 101, at 5.
\item \textsuperscript{254} See id. at 4.
\item \textsuperscript{255} See, e.g., Pasters' N' Things, Ltd., v. United States, 114 S. Ct. 1747, 1750-54 (1994).
\item \textsuperscript{256} See, e.g., MCI Telecommunications Corp. v. AT&T Corp., 114 S. Ct. 2223, 2231-31 (1994);
\item \textsuperscript{257} Cf. CHOMSKY, LECTURES ON GOVERNMENT AND BINDING, supra note 101, at 153-230.
\item \textsuperscript{258} Id. at 11.
\item \textsuperscript{259} FULLER, supra note 62, at 122.
\end{itemize}
law, the law's temporarily motionless astronomical anomalies are soon eclipsed by superior political and economic forces. Textualist "determinacy" and legal process "equilibrium" are both fraudulent. The only stability in law stems from the crude desires of those who temporarily command the power to legislate, enforce, and interpret in the positive state. Now that linguists have discredited the Sapir-Whorf hypothesis, lawyers have no reason to expect that any prescriptive approach to constitutional or statutory text will exert a meaningful constraint on law and legal interpreters. Let traditional lawyers adhere to the illusion of "principled" legal reason if they wish, for the rule of law is the crack cocaine of the masses. The truth has been within us all along: The social dynamics of the political system inherently limit majoritarian tyranny, excessive executive discretion, and other disasters for democracy without generating coherent legal principles. Political discipline is the legal equivalent of the implicit phonological code that keeps lazy speakers from flattening their speech and greedy listeners from demanding exaggerated distinctions between similar phonemes.

So it appears that linguistic analysis in the hands of a free-market advocate yields a conclusion that reeks of Critical Legal Studies. If this

260. Contra West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (describing the principle "that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" as a "fixed star in our constitutional constellation").

261. Cf. Chen & Gifford, supra note 15, at 1318-19 ("[T]he speedy world of communications has already eclipsed the fixed star of federal communications law.").

262. The Sapir-Whorf hypothesis posited that the semantic and syntactic features of human language define the range of behavior and abstract thought. See generally LANGUAGE, THOUGHT, AND REALITY: SELECTED WRITINGS OF BENJAMIN LEE WHORF (J.B. Carroll ed. 1956). For a devastating criticism of the hypothesis, see Pinker, supra note 104, at 59-67 (scoring yet another victory against the Standard Social Science Model). Despite his association with this hypothesis, Edward Sapir took pains to distinguish language from literature and other language-related expressions of culture and to combat the assumption that humans exhibit racially or ethnically linked linguistic tendencies. See Sapir, supra note 72, at 207-20.


265. That is to say, free markets, free minds, free love. Compare Jim Chen, The American Ideology, 48 VAND. L. REV. 809 (1995) (advocating the systematic demolition of anti-market measures in American agricultural law) with Chen, Unloving, supra note 138 (advocating the complete liberation
be heresy, make the most of it.266 "...The tools belong to the man who can use them."267 To the extent that they have been inspired by Quine and Wittgenstein, legal scholars as amateur linguists have been crippled by self-imposed epistemological "restrictions that . . . simply exclude from serious study the many fascinating questions" raised by linguistic analysis of law.268 If Critical Legal Studies and kindred intellectual movements continue to confine themselves to the prescriptively impotent tools of dissent and deconstruction,269 the law's voices of discontent will continue to miss the formidable critical power of legal analysis inspired by Chomskyan linguistics.270

In the beginning was the word, and the word was with the law, and the word was law. The bearers of the word were not the light, though they came to show us the light. The continuing infusion of linguistic wisdom into the law accelerates the decline of law as an autonomous discipline.271 Linguists have shown us several new ways of understanding ourselves as lawyers. May linguistics continue to enlighten the legal project and to quicken the deadening language of the law. May the law so touched become at last the word made flesh.272

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266. Cf. William Wirt, The Life and Character of Patrick Henry 18 (1818) (quoting Patrick Henry's May 1765 speech to the Virginia Convention: "If this be treason, make the most of it").

267. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) (quoting a "maxim" often attributed to Napoleon).


